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In the Supreme Court of the United States.

October Term, 1924.

In Equity.

(No. 3 Original).

STATE OF NEW MEXICO, *Complainant*,

vs.

STATE OF TEXAS, *Defendant*.

REPLY BRIEF OF THE STATE OF NEW MEXICO.

FRANK W. CLANCY,
Attorney for New Mexico.

GIBSON BROS., INC., WASH., D. C.

In the Supreme Court of the United States

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(No. 3 Orginal).

STATE OF NEW MEXICO, *Complainant,*
vs.
STATE OF TEXAS, *Defendant.*

The State of New Mexico did not heretofore file an additional brief covering the questions raised by the additional testimony taken at the recent hearing, for the reason that it was advised that a brief covering such matters would be prepared and filed by L. M. Crawford, as amicus curiae. Such brief has now been filed and the State of New Mexico, without in any way receding from its original contentions in this case, says that, subject to such reservation, it adopts the brief of the amicus curiae in so far as it covers the territory from the South line of the Canutillo grant to Piedras Paradas; and your complainant says that if it should be found that the Rio Grande did, in 1850, occupy the position claimed by Texas, then nevertheless it changed its position to that occupied by it in 1905, as shown by complainant's Exhibit No. 280, by accretion, changed from such 1905 location by avulsion. As the evidence to sustain the above

contentions has already been rather fully discussed in the brief of the amicus curiae, we shall only very briefly reply to the additional brief which has been filed by the State of Texas.

With reference to the boundary from the Southwest corner of the Canutillo grant to Piedras Paradas, the attorneys for the State of Texas have stated that there are only two questions to be decided:

> (1) Was the Rio Grande in 1905 within the above territory occupying substantially the position as shown on complainant's exhibit No. 280?
>
> (2) Did the Rio Grande reach such 1905 position from the 1850 position by accretion?

The first of the two questions above presented has been very fully discussed in the brief of the amicus curiae, but in view of several inaccurate statements contained in the Texas reply brief we shall now more fully detail some of the evidence given by Mr. R. J. Owen.

R. J. Owen testified with reference to defendant's exhibit No. 65 that the two parallel lines which are designated as "Rio Grande of 1905" and which extend from a point on the boundary line between Texas and New Mexico on the 32nd parallel down to a point South of the Piedras Paradas, and South of Frontera, correctly showed the position occupied by the Rio Grande in 1905 with the exception that such position was not correctly shown between the South line of the Canutillo grant and Piedras Paradas. (See answers to questions 3 and 4, Supp. Rec.)

He further testified that the two parallel lines within the territory between the South line of the Canutillo grant and Piedras Paradas followed an old depression that had probably been made from washes from the foothills or from overflows from the river. (See answers to questions 6 and 7, Supp. Rec.)

The witness then testified that he had prepared a map, which is complainant's exhibit No. 280, which correctly shows the position occupied by the river in 1905. (See answers to question 13, Supp. Rec.)

The witness further testified that the river was actually flowing along such river line up to 1905, from the Southwest corner of the Canutillo grant to where such river of 1905 passes around the Country Club grounds and intersects the present river. That the river was running along such 1905 river line, as shown on said map, and that he had been familiar with it as running in such location since about January, 1901. (See answers to questions 15 to 20, Supp. Rec.)

Witness then testified that the river left its old channel in 1905 from a point above the 32nd parallel to a point North of the Country Club and about at Station 47 on the river line, and that it continued to run in its old channel from said station No. 47 back to the line shown for the present river from 1905 until after 1909. (See answers to questions 19 to 27, Supp. Rec.)

Witness further testified that he was in the territory in question in the early part of 1903 and that at that time the Rio Grande was running in approximately the same position as shown for the river of 1905 on complainant's exhibit No. 280. (See answers to questions No. 30 to 33, Supp. Rec.)

He further testified that after the change from the 1905 location the river left its old channel pretty clearly defined. (See answers to questions 35 to 36, Supp. Rec.)

He further testified that he could at the present time follow the old river channel of 1905 with accuracy. (See answer to question No. 40, Supp. Rec.)

He further testified that the map which he had prepared and which is complainant's exhibit No. 280, is correctly

prepared and correctly shows the position of the river in 1905 within the territory in question. (See answers to questions 58 and 59, Supp. Rec.)

He further testified that his 1905 river is in substantially the same position as the river of 1903, as shown on the map of J. A. French, prepared for the United States Reclamation Service. (See answers to questions 77 to 82 and 85 and 87, Supp. Rec.)

He further testified that he became acquainted with the territory in question about 1901 and he explained in detail the nature of his acquaintance with the river in this territory from 1901 to about 1909. (See answers to questions 110 and 111, Supp. Rec.)

He further testified that in making his present map he meandered the old depression or channel which he knew to have been the channel of the river in 1905, and that it corresponded with the field notes as set out in the Crawford deed. (See answers to questions Nos. 211 to 231, Supp. Rec.)

He further testified that the river of 1905 as shown on complainant's exhibit No. 280 correctly shows the position actually occupied by the river to 1905. (See answers to questions 341 and 342, Supp. Rec.)

He further testified that the river of 1903, as shown on complainant's exhibit No. 21 is in substantially the same position as the river of 1905 as shown on complainant's exhibit No. 280.

The testimony of Mr. Owen is supported by the Reclamation Service map of the Rio Grande Valley, complainant's exhibit No. 21, and also by the field notes made by J. W. Eubank, as contained in the Crawford Deed. We think it significant that the State of Texas nowhere in its brief attempts to fix a definite location for the river within the period from 1901 to 1905.

> Assuming that the river in 1905 did occupy the position shown on complainant's exhibit No. 280, did it reach such position from its 1850 position by accretion?

Of course if the river in 1850 occupied a position as claimed by New Mexico, then under the evidence it left such position by avulsion; but we are now speaking upon the assumption that in 1850 it occupied the position as claimed by Texas. We do not care to add anything to the discussion as contained in the brief of the amicus curiae. We do, however, wish to discuss briefly the statements made in this connection by Texas in its reply brief. We notice on pages 22 and 23 of the reply brief Texas says that three witnesses testify to certain facts which would indicate an avulsive change. It is only necessary to remind the Court that all three of these witnesses were testifying as to conditions including the presence of old trees, on land all of which the witnesses stated lay to the East of the river as it existed from 1901 to 1905. They all stated positively that this growth consisting of old trees was entirely to the East of the river, as it ran, from 1901 to 1905. Therefore, if the river was in fact where Owen says it was, these witnesses were not testifying as to conditions on the land in question, but they were testifying about trees which were North and East of the land now in question. What we wish to say is made clear by reading the question as set out in italics on page 20 of the Texas reply brief:

> If there was actually in existence in 1905 the river of 1905, as shown in complainant's exhibit No 280, which was the main channel of the Rio Grande at that date from the Southwest corner of the Canutillo grant to Piedras Paradas and more especially as was shown around the Country Club, did the said river as there shown reach that position by avulsion or accretion?

We say that if the river was running as shown on complainant's exhibit No. 280, then the land under considera-

tion was to the West of the river in 1905 and the witnesses who testified for Texas were all describing land to the East of such 1905 river. None of these witnesses testified as to conditions to the West or to the South of the river of 1905, with the exception of Mr. Kezer, and his testimony was favorable to complainant upon the issue now under discussion. Mr. Kezer's testimony upon this particular phase of the case is discussed on pages 52 and 53 of the brief of the amicus curiae.

The witness, R. J. Owen, testified that there were no indications of an abandoned channel along the line of the 1852 river as such line is claimed by Texas, from the South line of the Canutillo grant to Piedras Paradas, with the exception of a certain depression mentioned by the witness, which depression is at a location where the 1905 river was to the West of the Texas 1852 river. (See answers to questions 45 to 53, Supp. Rec.)

Texas says that its theory is that every change in the river since 1850 has been by avulsion. R. J. Owen testified that the river frequently made changes by accretion. (See answers to questions 354 to 356.) An examination of the two maps of the Canutillo grant which were introduced at the original hearing (see maps following p. 3148 of the printed record) will show that the river had moved to the West in that locality by accretion, provided it ever in fact was in the location claimed by Texas. Also as shown by complainant's exhibit No. 280, if the 1850 river should be correct, the river had been striking the Santa Teresa Bluff at the Southwest corner of Survey 157 since 1850, and it is still striking the foothills at that same location. So we see that should it be found that the river in 1852 was in fact located as claimed by Texas then the river has remained at many places within the territory under consideration substantially without change, and where changes

have occurred they have been in the usual curves which accompany changes by accretion. It is true that in the Rio Grande Valley as in the Mississippi and Red River Valleys, the river in flood times overflowed and covered wide areas, but when the flood receded the waters returned or rather remained in their normal channels which, in fact, they had never abandoned but merely overflowed and of course these overflow waters frequently cut channels in various places through the Valley, which channels were visible when the floods receded. But the presence of such overflow channels is no indication that the main current of the river ever flowed in such channels.

In connection with the matters under discussion, we respectfully call this Court's attention to the fact that New Mexico was limited in the taking of this testimony, so that it was permitted to call only one witness, viz: Mr. R. J. Owen. Upon the other hand, the State of Texas was not limited in the testimony which it was allowed to present upon the issues now under discussion. We confidently assert that even as thus limited the State of New Mexico has fully established its contentions concerning the questions now under consideration.

Respectfully submitted.

FRANK W. CLANCY,
Attorney for the State of New Mexico.